Nos. 12317-12318-12319

In the United States Court of Appeals for the Ninth Circuit

HUGH H. EARLE, Collector of Internal Revenue for the District of Oregon,

v. Appellant,

LLOYD BABLER, RICHARD BABLER, JAMES A. POLLOCK and J. H. SCHESTAK, doing business as Lloyd Babler,

Appellees.

HUGH H. EARLE, Collector of Internal Revenue for the District of Oregon,

v. Appellant,

J. N. CONLEY, M. J. CONLEY and LLOYD BABLER, doing business as Babler and Conley,

Appellees.

HUGH H. EARLE, Collector of Internal Revenue for the District of Oregon,

v. Appellant,

J. N. CONLEY, M. J. CONLEY, HARRY BABLER and LLOYD BABLER, doing business as Babler Brothers,

Appellees.

On Appeals from the United States District Court for the District of Oregon

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BRIEF FOR THE APPELLEES

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No. 12318

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Appellees.

No. 12319

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v. Appellant,

J. N. CONLEY, M. J. CONLEY, HARRY BABLER and LLOYD BABLER, doing business as Babler Brothers,

Appellees.

On Appeals from the United States District Court for the District of Oregon

BRIEF FOR THE APPELLEES

PRELIMINARY STATEMENT

These appeals involve three consolidated actions for the recovery of taxes on amounts alleged to have been paid for the transportation of property, together with penalties and

interest thereon, assessed by the Commissioner of Internal Revenue and collected from appellees by appellant purporting to act under the authority of Section 3475 of the Internal Revenue Code of the United States (26 U.S.C. 3475), the pertinent parts of which are as follows:

> "(a) Tax. There shall be imposed upon the amount paid within the United States after the effective date of this section for the transportation, on or after such effective date, of property by rail, motor vehicle, water, or air from one point in the United States to another, a tax equal to 3 per centum of the amount so paid. . . . Such tax shall apply only to amounts paid to a person engaged in the business of transporting property for hire, including amounts paid to a freight forwarder, express company or similar person. . . .
>
> "(c) Returns and payment. The tax imposed by this section shall be paid by the person making the payment subject to the tax. Each person receiving any payment specified in subsection (a) shall collect the amount of the tax imposed from the person making such payment, and shall, on or before the last day of each month, make a return, under oath, for the preceding month, and pay the taxes so collected to the collector in the district in which his principal place of business is located. . . ."

During the periods of time involved in these actions, the respective appellees were engaged as partners in a general contracting business. As a part of that business, appellees entered into several contracts whereby they undertook

certain road and airport construction and resurfacing work and, in order to supplement their own equipment and carry out said contracts, entered into verbal lease agreements with various owners of trucks for the purpose of transporting bulk construction materials from stock piles, quarries, and other locations to the sites of the roads and airports which they were constructing or resurfacing. The owners of the trucks were paid a rental on an hourly, load, or yard mile basis. In some cases a truck was operated by the owner of the truck and in other instances by others. (R. 15-16; 46-47; 75.)

The Commissioner of Internal Revenue, asserting that the truck owner-operators and drivers were not the employees of the appellees and that the truck owners were persons engaged in the business of transporting property for hire, assessed a tax against the appellees equal to 3 per cent of the amounts paid by appellees to said truck owner-operators and drivers during the respective periods, together with penalties and interest thereon. (R. 16; 47; 76.)

Appellees, under threat of seizure and sale of their property by appellant, paid to appellant the full amount of such transportation taxes, penalties and interest assessed, and thereafter filed claims for refund of such amounts. The claims being denied, appellees brought these actions which resulted in the judgments which are the subject of these appeals. (R. 16; 47-48; 76.)

Although $11.25 of the $173.11 tax involved in No. 12318 was assessed on amounts alleged to have been paid for the transportation of persons under the provisions of Section 3469 of the Internal Revenue Code (26 U. S. C. 3469), because appellees in that case also entered into similar agreements with truck owners for the purpose of transporting some of their employees to the site of a construction job, appellees will not discuss this minor subject, except to state that it is doubtful that Congress ever envisioned the assessment of such tax in this situation. The trial court found that such transportation of a few of appellees' employees to the site of a construction job did not constitute the transportation of persons within the purview of Section 3469 of the Internal Revenue Code. (R. 49.)

APPELLEES' CONTENTIONS

Appellees contend and the trial court so found (R. 18; 49; 77) that the taxes on the transportation of property were illegally assessed and collected from them for either one of the following reasons:

1. All of the truck drivers, whether they owned their own trucks or not, were employees of the appellees and hence were not "persons engaged in the business of transporting property for hire" as specified in Section 3475 of the Internal Revenue Code.

2. The hauling for the highway and air base construction work involved here did not constitute "transportation . . . of property by . . . motor vehicle . . . from one point in the United States to another" within the meaning of the Act, or, as stated in appellees' refund claims: "The hauling was not in itself an independent calling, but was a minor part of our general contracting business." (Appellees' Exhibits 2, 3, and 4; R. 121-122.)

ARGUMENT

I.

All of the truck drivers, whether truck owners or not, were employees of the respective appellees during the periods in question and hence were not "persons engaged in the business of transporting property for hire."

a. Effect of employer-employee relationship on applicability of transportation tax.

Appellant properly concedes on page 14 of his brief that if the relationship of employer and employee existed between these appellees and the truck drivers during the periods involved, that the drivers were, ipso facto, not "persons engaged in the business of transporting property for hire" and that the tax should be refunded. This has been the consistent position of the Commissioner of Internal Revenue. *M. T. 9, 1943 C. B. 1159.*

"If the relationship of employer and employee exists for federal employment tax purposes between the independent owner-truckers and the persons who engaged their services, the amounts paid to such truckers by their employers are not subject to the tax on the transportation of property as long as such relationship exists." *Letter Ruling, Bureau of Internal Revenue, dated February 4, 1943, Federal Tax Service, Prentice-Hall, 1943, Par. 66,112.*

b. Federal employment tax regulations and decisions.

In view of the foregoing, we turn to the question as to whether or not the relationship of employer and employee existed for federal employment tax purposes between the owner-truckers and other drivers and the appellees.

As the court knows, federal employment taxes are imposed upon employers under the provisions of Chapter 9 of Title 26, United States Code. These include the Social Security tax of 1 per cent of wages as provided by Section 1410 et seq (Subchapter A) and the additional tax of 3 per cent on employers of eight or more as provided by Section 1600 et seq (Subchapter C) of Title 26. Sections 1426(d) and 1607(i) are identical, defining "employee" as follows:

"Employee. The term 'employee' includes an officer of a corporation, but such term does not include (1) any individual who, under the usual common-law rules applicable in determining the employer-employee relationship, has the status of an independent contrac-

tor or (2) any individual (except an officer of a corporation) who is not an employee under such common-law rules."

These definitions were inserted in the Act on June 13, 1948, and were made retroactive to February 10, 1939, by Section 1(b) of the Act. They reaffirmed the common-law rules after the decisions of the Supreme Court of the United States in *United States v. Silk,* and *Harrison v. Greyvan Lines, Inc.,* (1947) 331 U. S. 704, 67 S. Ct. 1463; *Paragraph 7, Report No. 1255 of Senate Finance Committee on H. J. Res. 296.*

The regulations and decisions of the Bureau of Internal Revenue would establish the employer-employee relationship here for federal employment tax purposes, even though we disregarded the common-law rules. Section 403.204 of Regulations 107 issued by the Commissioner of Internal Revenue, interpreting Section 1607(i) of Title 26, provides in part as follows:

"Every individual is an employee if the relationship between him and the person for whom he performs services is the legal relationship of employer and employee.

"Generally such relationship exists when the person for whom services are performed has the right to control and direct the individual who performs the services, not only as to the result to be accomplished by the work but also as to the details and means by which that result is accomplished. That is, an employee

> is subject to the will and control of the employer not only as to *what* shall be done but *how* it shall be done. In this connection, it is not necessary that the employer actually direct or control the manner in which the services are performed; it is sufficient if he has the right to do so. The right to discharge is also an important factor indicating that the person possessing that right is an employer.
>
> "The measurement, method, or designation of compensation is also immaterial, if the relationship of employer and employee in fact exists. . . ."

In each of the cases at bar, the District Court made the following finding of fact:

> "All of said truck drivers, whether they were truck owners or not, were subject to the will and control of the plaintiffs not only as to what should be done but how it should be done, and plaintiffs had the right to discharge said truck drivers, whether truck owners or not, at any time." (R. 17; 48; 76.)

In factual situations almost identical to the instant cases, the Bureau of Internal Revenue has uniformly ruled that the truck owner-drivers are employees, not independent contractors. *S. S. T. 403, 1940-2 C. B. 250; S. S. T. 307, 1938-2 C. B. 279;* and *S. S. T. 198, 1937-2 C. B. 393.* The federal courts have agreed. The summary of the unreported decision of the United States District Court for the Western District of Michigan, Southern Division, dated March 30, 1943, in the case of *Grand Rapids Gravel Co. v. United States,* found in Commerce Clearing House Federal Unem-

ployment Insurance Service, Paragraph 5054.90, reads:

> "Individuals who owned trucks and who operated such trucks in hauling sand and gravel for plaintiff during the period 1936-1940 on a yardage or tonnage basis were held to be employees of plaintiff for employment tax purposes, and not independent contractors. The Court found that plaintiff had the right to discharge the truck operators at will and without liability for so doing, and that the amount of work done by each of the operators and the time and place of performance as to each load were wholly within the discretion of plaintiff or its agents. The fact that the drivers owned their own trucks, that a portion of their work was, of necessity, upon the public highways, and that they were paid for hauling on a yardage basis is insufficient to outweigh the deductions which follow from other facts concerning circumstances under which the services were performed."

Ohio River Sand Co. v. United States, 60 F. Supp. 563, also has some features similar to our cases. Plaintiff furnished a tugboat, together with the operator and a full crew and all necessary fuel and operating supplies, to the Standard Oil Company at a daily rental for the purpose of hauling barges on the Mississippi River. The Standard Oil Company furnished the master of the boat and gave all instructions and sailing directions. The court held that the transportation tax was improperly assessed and collected for the reason that plaintiff was not "engaged in the business of transporting property for hire" but had leased its boat on a rental basis. We contend, and the trial court so found,

that the trucks involved in these cases were in the same category. (R. 15; 46-47; 75.)

The Commissioner of Internal Revenue, in declaring when the employer-employee relationship exists for federal employment tax purposes, agrees with the common-law rule that "the really essential element of the relationship is the right of control," *35 Am. Jur., Master and Servant, Section 3.*

c. Application of state law.

Since common-law rules are to be applied in determining whether the employer-employee relationship exists, we must of necessity look to the decisions of the Supreme Court of the State of Oregon. "There is no federal general common law." *Erie R. Co. v. Tompkins,* (1938) 304 U. S. 64, 58 S. Ct. 817. *Section 1652 of Title 28, United States Code,* as amended, is as follows:

> "The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply."

The above section is, except for phraseology, the same as Section 725 of Title 28, which it superseded. Numerous authorities applying the statute to matters of taxation are cited under Note 157 to this section of the United States Code Annotated. As this court pointed out in the case of

United States v. Lambeth, Par. 9386, 1949 C.C.H. Fed. Tax Reporter, decided August 19, 1949: "The application of a Federal statute may be conditioned upon a status determined by local law."

The recent decision of the Supreme Court of the State of Oregon in *Bowser v. State Industrial Accident Commission,* decided October 24, 1947, 182 Or. 42; 285 Pac. (2d) 891, involved the status of a log hauler furnishing his own truck and hauling logs for a logging company at stated prices per thousand. The sole issue presented was whether the truck driver-owner was an employee or an independent contractor. The court discussed the authorities at length (they are also collected in 42 A. L. R. 607; 43 A. L. R. 1312; and 120 A. L. R. 1031) and concluded that the truck driver-owner was an employee, not an independent contractor. The facts as detailed in the opinion bear a striking resemblance to the facts in the instant cases. The court designated control as the primary test and certain other tests as secondary.

We submit that the evidence in the cases at bar demonstrated that appellees not only had the right to control the progress of the work and the exact manner of accomplishing the results, but that they did in fact exercise that control. The truck drivers were directed by appellees' agents as to how, where, when, and what to haul. (R. 128-130; 159-160.)

The tests set out in the *Bowser* opinion, when applied here, would seem to clearly show that the relationship of employer and employee existed between the truck drivers and the appellees. Summarizing its opinion, the Oregon Supreme Court said, at page 63:

> "From the foregoing it appears that the logging company not only had the right and power to control the operation, but to a great degree actually exercised that right; that it had a right to terminate the relationship at will without liability; that the nature of the work was such that respondent was not required to do a specific piece of work, but only such as the company could provide from day to day when it wanted to operate; that the mode of making compensation (by the thousand) could as well be considered wages as returns from a contract, and that respondent rendered services exclusively for the company—all these circumstances point to the relationship of employer and employee. As against this, the only fact pointing in the other direction is the ownership and maintenance of the truck and semi-trailer by respondent. As the cases point out, that is not conclusive."

On page 13 of appellant's brief he attempts to make a point of the fact that the Public Utility Commission permits in the instant cases were held by the truck owners, not the appellees. As appellant's own witness testified (R. 125-126), log haulers like Bowser have the same permits.

II.

The hauling of the bulk construction materials from

stock piles, quarries, and other locations to the sites of the roads and airports which appellees were constructing or resurfacing did not constitute the transportation of property within the purview of Section 3475 of the Internal Revenue Code.

Assuming for the sake of argument that the truck drivers were not subject to the control of appellees and that they were independent contractors, we turn to the other phase of these cases, namely, whether this was "transportation of property" within the meaning of the transportation tax statute. We submit that Congress never intended that the transportation tax should be applied to operations similar to those conducted by the appellees herein. The only two cases we have been able to find which had somewhat similar factual situations are *J. D. Williams et al v. United States,* D. C. Ariz., 72 F. Supp. 300, decided March 21, 1947, and *Charles M. Lyle v. United States,* D. C. Ga., 76 F. Supp. 787, decided February 2, 1948, both of which ordered a refund of transportation taxes collected. The government appealed neither of those decisions.

In the *Williams* case, plaintiff Williams was the owner of a fleet of trucks, the other plaintiffs were contractors engaged in the construction of airports, roads, and facilities. To augment their construction equipment, the contractors rented, from time to time, from plaintiff Williams certain dump and tank trucks under verbal agreements to pay, as

rents, certain rates, standard in the community, per hour, per yard or per ton, for use on a fully operated basis. The District Court found that the contractors had the right to exercise, and did exercise, exclusive possession, direction and control of the trucks in their operations. Operators of the trucks were ordered from the union hall and immediately went on the payroll of the contractors. "Thereafter their wages, income and Social Security taxes, Workman's Compensation premiums and other usual incidents of employment were paid and handled by the contractors in all respects the same as for their other employees. . . Periodically, the contractors computed the rental due at the applicable rates, deducted amounts paid by them for fuel, payrolls, and so forth, and paid J. D. Williams the balance."

We submit that the facts in the *Williams* case are almost on all fours with appellees' cases here. The District Court made the following conclusions of law:

> "1. That at all times during the rental periods, the operators of the rented trucks were employees of the contractor plaintiffs.
>
> "2. That the use of the rented trucks was incidental to construction operations of contractor plaintiffs and not transportation of property within the meaning of those words as used in Section 3475, I. R. C.
>
> "3. That to the extent said trucks were engaged in the transportation of property such transportation was performed by the contractor plaintiffs and not by plaintiff Williams.

"4. That plaintiffs are entitled to judgment as prayed for in their complaint."

The facts in the *Lyle* case, supra, are not quite as apposite as in the *Williams* case, inasmuch as all of the hauling there involved was within the boundaries of the airport which plaintiffs were constructing. The District Court, in deciding that plaintiff was entitled to a refund of the transportation taxes paid, based its decision principally upon the words in the statute: "from one point in the United States to another" and said:

"The transactions as set forth in the findings of fact did not constitute transportation of property from one point in the United States to another, within the meaning of Section 3475 of the Internal Revenue Code, and the payment of an hourly rental for dump trucks used only within the confines of the airfield being leveled, and as an incident of the grading and leveling of such airfield, was not a payment for the transportation of property within the terms of the statute just cited. Neither the statute, nor the regulations issued pursuant thereto, either expressly or by fair implication, evidence any applicability to transactions of the kind now under consideration, but, on the contrary, evidence intent to subject to tax liability payments made for transportation in the manner and by the means specified as the language employed is commonly understood in the light of present day transportation practices and custom. The hauling of dirt by dump trucks hired upon an hourly basis, which are used exclusively in the leveling of an airfield, and within its confines only, presents none of the elements of trans-

portation as that term is generally understood."

Although the hauling in the instant cases went beyond the boundaries of the airports which were being constructed, in order to secure rock or cinders from nearby pits or quarries, we do not feel that Congress ever intended to tax such operations which were merely a minor integral part of appellees' general contracting business. (Appellees' Exhibits 2, 3 and 4; R. 121-122.)

III.

The findings of fact made by the trial court are not "clearly erroneous" and should be sustained under Rule 52(a) of the Federal Rules of Civil Procedure.

After fully considering all of the evidence introduced by both parties upon the trial of these cases, the District Court found that the respective appellees had entered into verbal lease agreements with the truck owners (R. 15; 46-47; 75), and that all of the truck drivers, whether they were truck owners or not, were subject to the will and control of the appellees, not only as to what should be done but how it should be done (R. 17; 48; 76), and found that appellees had the right to discharge the truck drivers, whether truck owners or not, at any time. (R. 17; 48; 16.) From these and other findings of fact, the District Court concluded that the truck drivers were employees of the appellees, that the truck owners were not persons engaged

in the business of transporting property for hire and that the hauling in question did not constitute the transportation of property within the purview of Section 3475 of the Internal Revenue Code. (R. 17; 48-49; 77.) We submit that the testimony adduced upon the trial of these cases, even by appellant's own witnesses, furnished a reasonable basis for the findings of the trial court and that they should be sustained.

CASES CITED BY APPELLANT

We think it is fair to say that appellant chiefly relies upon the decisions in *Bridge Auto Renting Corp. v. Pedrick* (C. A. 2d), 174 Fed. (2d) 733, and *John J. Casale, Inc., v. The United States,* a Court of Claims decision reported at Paragraph 9409 of the 1949 Commerce Clearing House Federal Tax Reporter, in both of which the transportation tax was assessed against owners of large fleets of trucks operating in New York City who also furnished drivers for some of their vehicles. Appellant also cites certain cases defining "contract carrier" under Part II of the Interstate Commerce Act (49 U. S. C. 301 et seq) to support his contention that the truck owner-operators involved here were contract carriers.

Taking up first the facts in the *Bridge Auto Renting Corp.* case, supra, we find there that for many years plaintiff Metropolitan Distributors, Inc., had been engaged in the

business of renting trucks to mercantile concerns for use in delivering merchandise in New York City. It acquired plaintiff Bridge Auto Renting Corporation which was engaged in the same business. It also acquired plaintiff Bridge Leasing Corporation whose business was the furnishing of "a so-called pay roll service" under which it paid wages, pay roll taxes and compensation insurance of the drivers for such customers of Metropolitan as desired the service, being reimbursed periodically by such customers. All three companies were operated as a unit. Transportation taxes were assessed on the amounts received as truck rentals and also on the amounts received by Bridge Leasing as reimbursement for wages and pay roll taxes. No transportation taxes were imposed on amounts received by Metropolitan (on more than 90% of its business) where the pay roll service of Bridge Leasing was not used. Plaintiffs contended that the drivers on the pay roll of Bridge Leasing were not its employees but were employees of the lessees. Defendant contended that together the plaintiffs "were in substance furnishing a transportation service for hire because they are 'contract carriers'." The details of the long-term written agreements with the lessees are set out in full in the opinion.

The pay roll service was used (by less than 10% of the lessees) because the "lessee desired to be rid of the annoyance and work involved in preparing pay rolls and pay roll checks, arranging for the drivers to get their checks, and

attending to the various laws requiring pay roll deductions, or, if the drivers had been unionized or were about to become so, to avoid negotiating with the unions. . . . After an agreement was entered into, the drivers were taken off the pay roll of the lessee and placed on the pay roll of Metropolitan or Bridge Leasing."

Metropolitan kept records of the time worked by the various drivers and made out all of the necessary Social Security and income tax withholding returns. Such taxes were paid directly to the Collector of Internal Revenue by Metropolitan. "In making all of these returns Metropolitan or Bridge Leasing, as the case might be, described itself as the employer and the drivers as its employees." Certain lessees testified that the drivers were not considered by them to be their employees, and correspondence introduced in evidence indicated that Bridge Leasing had acknowledged itself to be the employer.

The lower court held that Metropolitan and the other plaintiffs were contract carriers because they retained control over the movement of the trucks. In affirming this decision, the Court of Appeals for the Second Circuit made no attempt to support the judgment by "tagging the appellant a contract carrier" but stated that the question was whether what it did added up to enough to be substantially what is done by a person hired and paid to transport property by truck. The court stated that the customers had only

to provide the goods for transport, direct the drivers where to take them, and pay the appellant for performing the transportation service. Considering all of these facts and circumstances, the appellate court upheld the findings and affirmed the judgment of the trial court. We feel that a comparison of the above facts in the Bridge Auto Renting Corp. case with the findings of fact and testimony in the instant cases will support our contention that they are factually dissimilar. The findings of fact made by the District Court in the Bridge Auto Renting Corporation case regarding the right to control were directly contrary to the findings of fact of the District Court in the cases at bar.

John J. Casale, Inc., supra, also was a corporation engaged in the business of owning and leasing trucks in New York City. For some of its customers it also furnished drivers under the terms of detailed long-term written contracts. To illustrate how the factual situation there was entirely different from the cases at bar, we quote from the opinion of the court:

> "In cases where plaintiff furnished both trucks and drivers to customers, plaintiff selected and hired the drivers, contracted concerning the drivers' working conditions, hours, holidays, vacations, seniority, and rates of pay, with the various drivers' unions having jurisdiction, paid the drivers, and retained to itself the sole right to transfer or discharge them within the terms of its contract with the unions. The drivers were required to report at plaintiff's garages at the beginning of each working day and to return there with the

trucks to check out and park the trucks at the end of each day. Plaintiff's dispatchers at the beginning of each working day sent the trucks and drivers to destinations designated by the individual customers. During the working day the drivers operated under directions of the customers as to places to go and times to go, as to loading and unloading, identity and quantity of merchandise to be carried, whether to collect on delivery of merchandise, etc. The drivers were carried only on plaintiff's pay roll and the unions recognized only plaintiff as the employer of the drivers. Plaintiff was registered with the New York State Unemployment Office as the employer of the drivers. Plaintiff paid the drivers on time tickets prepared at plaintiff's garages and added the labor charges to the bills submitted to its customers for services. In addition to those charges, plaintiff billed its customers for the drivers' services an eight per cent over-all fee compensation for the drivers, unemployment compensation for the drivers' unemployment insurance, social security taxes, time clocks and time cards, the costs of making up pay rolls, issuing checks, office services, etc.

"The facts show that the drivers furnished to customers with plaintiff's trucks were plaintiff's employees and the custodians of its property while the trucks were in use on business of the customers. Plaintiff furnished all supplies and services requisite and necessary to the operation of the trucks. Plaintiff had the exclusive right, limited only by the terms of its contracts with the unions, to hire and discharge the drivers of the trucks, and it also had, at all times, the general right of direction and control of its trucks and drivers. . . ."

Although appellant made no such specific contention in the lower court (R. 11; 41-42; 71; 95), he now argues that the truck owner-operators were "contract carriers" as defined in the Regulations interpreting the transportation tax statute, citing several decisions under the Motor Carrier Act. (49 U. S. C. 301 et seq.) Those decisions involved the question as to whether a particular operation constituted the applicant a contract carrier or a private carrier as defined in Section 303 of Title 49, United States Code. As the court stated in the *Bridge Auto Renting Corp.* decision, supra, in referring to the Motor Carrier Act:

> "While it is true that the purpose of that Act is different and so is the language, the problem is much the same in that it requires separating the essentially important features from the nonessentials and drawing a more or less arbitrary line between complex *fact* situations differing but slightly." (emphasis supplied.)

All of the cases cited by appellant upon this point stress the principle that control is the distinguishing feature. In *Motor Haulage Co., Inc., v. United States,* 46 M. C. C. 107, 70 F. Supp. 17, affirmed per curiam, 331 U. S. 784, cited by appellant, the District Court said at page 21 that "direct and complete control of the movement and handling of the freight is the test that should be applied," and in each and every other case cited by appellant on this point there is a specific finding of fact by the court that the applicant had complete control over the operation and thus qualified as a

contract carrier. The District Court in the cases at bar, on the other hand, made a specific finding of fact to the contrary. (R. 17; 48; 76.)

Passing to the second half of appellant's argument, we do not think that appellant seriously contends that a question of law rather than fact is presented in determining whether or not the employer-employee relationship existed (Appellant's Brief, p. 13), but he argues that the findings of fact of the trial court are "clearly erroneous" and thus subject to review by this court. He quotes language from the recent decision in *United States v. U. S. Gypsum Co.*, et al, (1948), 333 U. S. 364, 68 S. Ct. 525, to the effect that a finding is "clearly erroneous" when the reviewing court on the entire evidence is left with the definite and firm convicion that a mistake has been committed. This is merely another way of saying the same thing and cannot be interpreted as a new expression of the Supreme Court enlarging the meaning of Rule 52(a) of the Federal Rules of Civil Procedure. Cf. *Graver Tank & Mfg. Co. v. Linde Air Products Co.* (1949), 69 S. Ct. 535, 537-8.

Appellant cites and quotes from the cases of *United States v. Silk* and *Harrison v. Greyvan Lines, Inc.*, supra, although the definition of "employee" in the Social Security Act was amended after those decisions were rendered. (Sections 1426(d) and 1607(i) of Title 26, United States Code.) In any event, we submit that the factual situations

in those cases were inapposite to the instant cases, and we have attached hereto as an appendix a detailed comparison of the factual situations.

On page 16 of his brief, appellant quotes from *Anglim v. Empire Star Mines Co.,* 129 F. (2d) 914, a decision of this court involving the application of the Social Security tax to an arrangement under which a mining company leased part of its mine to miners under the terms of a written contract. This court held that, under the facts presented, the miners were independent contractors. In comparing this arrangement with that in other parts of the mine which were worked by the company's employees, this court said, at page 916:

> "Operations under these leases differed substantially from those of the taxpayer itself. The leasers had a free hand in determining where and in what manner to work their areas, how to sort the ore, what to discard as waste, etc. Taxpayer's only supervisory official to visit their work was the safety engineer who made periodic inspections in conformity with state laws. (In contrast with this, the taxpayer's operations were subject to the constant supervision of its shift bosses, foremen, superintendent, and its general manager.)"

A reading of the opinion in *Mutual Trucking Company v. United States,* 141 F. (2d) 655, relied upon by the appellant, will show that the company there engaged in interstate hauling entered into detailed written contracts with

certain truck owner-operators to haul freight at a flat rate per trip according to a printed schedule. The court said:

> "Neither the drivers nor the owner-operators are under appellee's control with reference to the manner of their work. The important regulations which they observe grow out of and are imposed by the contract and the applicable (state) statutes and regulations. The drivers follow the routes required by the (public utility) commissions of the various states but with some deviation and in such case 'upon their own responsibility.'
>
> "In this case concededly the owner-operators completely control payment of the wages."

Glenn v. Standard Oil Co., 148 F. (2d) 51, also cited by appellant, was a Social Security tax case involving the question as to whether certain commission agents operating bulk distributing plants were independent contractors or employees of the oil company. The appellate court restated the general rule that the determining factor is the right to control and direct the individual who performs the services, not only as to the result to be accomplished by the work but also as to the details and means by which that result is accomplished, and sustained the findings of fact by the trial court that the company did not attempt to control the details and means by which the agents accomplished their result.

Boston Elevated Railway Co. v. Malley, 288 Fed. 864, cited by appellant, also declared control to be the determin-

ing factor. That case was decided under the Revenue Act of 1917, which differed from Section 3475 of the Internal Revenue Code in that it did not limit the tax to "amounts paid to a person engaged in the business of transporting property for hire." (40 Stat. 314.)

Finally, appellant says on page 15 of his brief that "most informative as to the correct result to be reached are the criteria of the employment relationship set forth in the Restatement of the Law, Agency, Section 220," and Subsection (2) of such section is contained in Appendix B to his brief. Subsection (1) of Section 220, however, is as follows:

> "(1). A servant is a person employed to perform service for another in his affairs and who, with respect to his physical conduct in the performance of the service, is subject to the other's control or right to control."

Control, or the right to control, is thus determined by applying the various subparagraphs of Subsection (2), or, as stated in the Comment found in the Restatement under this section:

> "The factors stated in Subsection (2) are all considered in determining the question, and it is *for the triers of the fact to determine* whether or not there is a sufficient group of favorable factors to establish the relationship." (emphasis supplied.)

We submit that even the testimony of appellant's own witnesses supports the findings of fact made by the trial court. Witness L. M. Case testified that a representative

of the appellees directed him how to do his job. (R. 150.) Jack Becker, another of appellant's witnesses, testified as follows (R. 159-160):

"Q. Could the company have terminated your working on the job if they had wanted to?

"A. Yes.

"Q. On the job itself what right did the company have to tell you how to do the job?

"A. Well, it is their job. They just hire trucks and we take orders from them. We have to do as they tell us.

"Q. They would tell you where to spot the trucks for loading?

"A. Where to haul from and where to.

"Q. Where to haul from and where to and what routes to take?

"A. Yes."

Appellant's witness William M. Anderson, one of the truck owner-operators, twice stated flatly that he considered himself to be an employee of the appellees. (R. 165 and 167.)

Appellant has failed to point to any element of control which was not exercised by appellees in directing the truck drivers.

CONCLUSION

It is noteworthy that in the instant cases the appellant, or his predecessor in office, has collected the federal employment taxes and other Social Security taxes based upon the amounts paid by appellees to the truck drivers, whether they were truck owners or not. (They were also carried by appellees as employees under the Oregon Workmen's Compensation Act and Oregon Unemployment Compensation Act.) (R. 105.) The appellant has not refunded such employment taxes, despite the authority given him by Section 1421 of Title 26, United States Code, and if appellees were to file claims for refund of those taxes, they would no doubt be advised by the Commissioner of Internal Revenue that their claims were now barred by the applicable statute of limitations. Title 26, Section 3313, United States Code. The appellant, having elected to receive and retain the federal employment taxes, should not be permitted to also retain the transportation taxes assessed and collected by him on a theory entirely inconsistent with his previous position.

In view of the foregoing, we submit that the findings of the trial court are not "clearly erroneous" and that the judgments of the trial court are correct and should be affirmed.

Respectfully submitted,

CARL E. DAVIDSON,
CHARLES P. DUFFY.

U. S. v. Silk	Harrison v. Greyvan Lines	Babler Bros.
"The truckers are not instructed how to do their jobs, but are merely given a ticket telling them where the coal is to be delivered and whether the charge is to be collected or not."	"The company's instructions covered directions to the truckmen as to where and when to load freight. . . . The company maintained a staff of dispatchers who issued orders for the truckmen's movements, although not the routes to be used."	Truck drivers were directed as to what, where, when, and how to haul; complete control of every detail by the company. (R. 128.)
"Any damage caused by them is paid for by the company."	Truckmen required "to furnish all fire, theft and collision insurance which the (company) might specify to pay for all loss or damage to shipments and to indemnify the company." "Cargo insurance was carried by the company."	Company carried liability insurance at its own expense. Truckers carried the amount of insurance required for their PUC licenses. (R. 109; 125.)
"The truckers could and often did refuse to make a delivery without penalty."	Required to haul freight tendered by the company.	Required to haul as directed or face immediate discharge. (R. 128.)

APPENDIX—Continued

U. S. v. Silk	Harrison v. Greyvan Lines	Babler Bros.
"The truckers may come and go as they please and frequently did leave the premises without permission."	(See above.)	Subject to detailed control by the company. (R. 159-160.)
"They may and did haul for others when they pleased."	"Truckmen were required to haul exclusively for the (company)."	Hauled exclusively for the company while on the payroll (R. 129.)
Sold coal at retail; delivered by truck.	Common carrier of household furniture by motor truck.	Construction of roads and airports. (R. 15; 46-47; 75.)
Silk "owns no trucks himself."	"The company had some trucks driven by truckmen who were admittedly company employees."	One of partners owned some trucks rented to company on same basis as others. (R. 135, 136.)
"contracts with workers who own their own trucks"	Written contracts with the truckmen who furnish their own trucks and all equipment and labor.	Oral agreements with truck owners. (R. 15; 46-47; 75.)

U. S. v. Silk	Harrison v. Greyvan Lines	Babler Bros.
"deliver coal at a uniform price per ton"	"truckmen were to receive from the company a percentage of the tariff charged by the company."	Drivers paid union scale — hourly rate — whether owners or not. (R. 109.)
"paid to the trucker by the (company) out of the price he receives for the coal from the customer"	(See above.)	Paid in the same manner as all other employees — on regular payroll. (R. 143.)
"When an order for coal is taken in the company office, a bell is rung which rings in the building used by the truckers. The truckers have voluntarily adopted a call list upon which their names come up in turn, and the top man on the list has an opportunity to deliver the coal ordered."	"All contracts or bills of lading for the shipment of goods were to be between the (company) and the shipper. . . . . If freight was tendered the truckmen, they were under obligation to notify the company so that it could complete the contract for shipment in its own name."	Drivers required to report for work each morning at a specified time and to work as directed by the company. (R. 142.)

U. S. v. Silk	Harrison v. Greyvan Lines	Babler Bros.
"They pay all the expenses of operating their trucks, and furnish extra help necessary to the delivery of the coal and all equipment except the yard storage bins."	"furnish their own trucks and all equipment and labor necessary to pick up, handle and deliver shipments, to pay all expenses of operation." I.C.C. and other permits furnished by the company at its expense.	Furnished own trucks and some drivers. Some drivers employed by the company through union. All drivers carried on company payroll and paid by the company. (R. 140-143.)
"No record is kept of their time."	(Apparently) no record kept of their time.	Exact record kept of their time. (R. 140-143.)
"They are paid after each trip, at the end of the day or at the end of the week, as they request."	(Apparently) paid periodically a percentage of the tariff on freight hauled by them.	Paid periodically the same as all other employees of the company. (R. 140-143.)
Apparently not required to personally drive the trucks.	Required to personally drive their trucks.	Not required to personally drive trucks. (R. 127.)
Oral contract apparently terminable at any time by either party.	Written "contract was terminable at any time by either party."	Oral contract terminable at any time by either party. (R. 161.)